

DEPARTMENT OF LABOR AND INDUSTRY

CHAPTER 8

HUMAN RIGHTS BUREAU

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DEPARTMENT OF LABOR AND INDUSTRY

CHAPTER 8

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Subchapter 1

Organizational Rules

24.8.101 PURPOSE AND SCOPE OF RULES -- EFFECT OF PARTIAL INVALIDITY (1) The purpose of the rules in this chapter is to describe the procedures followed by the Department of Labor and Industry's Human Rights Bureau and Hearings Bureau in administering complaints of discrimination filed pursuant to the Montana Human Rights Act (act) and the Governmental Code of Fair Practices (code) contained in Title 49, chapters 2 and 3, MCA.

(2) The Human Rights Bureau and the Hearings Bureau will construe the provisions of the act, the code, and these rules with a view to effect their objects and to promote justice. A principal objective of the act and code is to assure that there will be no discrimination in certain areas of the lives of Montana citizens, except under the most limited of circumstances.

(3) In construing the provisions of the act and code, the Human Rights Bureau and the Hearings Bureau will refer to federal civil rights case law where it is both useful and appropriate and does not conflict with the purposes and intentions of state law.

(4) If a part of these rules is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of these rules is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application or applications.

(5) Parties who assign error for the violation of any rule have the burden to demonstrate that a failure to comply with these rules is in fact prejudicial or constitutes prejudice as a matter of law.

(6) Where strict adherence to these rules would cause undue hardship or create a substantial injustice to a party, the Human Rights Bureau and the Hearings Bureau may modify, waive, or excuse their application unless required by statute or due process of law.

(7) Parties who choose not to be represented by counsel and who represent themselves must substantially comply with the provisions of these rules, subject to the provisions of (6). The Human Rights Bureau and the Hearings Bureau may modify the strict application of these rules to an unrepresented party to the extent they are not mandatory to assure fundamental fairness. (History: 49-2-204, 49-3-106, MCA; IMP, Title 49, ch. 2 and ch. 3, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.102 reserved

24.8.103 DEFINITIONS The following definitions apply throughout this chapter:

- (1) "Act" means the Human Rights Act, Title 49, chapter 2, MCA.
 - (2) "Aggrieved party" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been specially and injuriously affected by, or is likely to be a victim of a violation of the Act or Code, as defined in 49-2-101, MCA.
 - (3) "Charging party" means a person who files a discrimination complaint with the Human Rights Bureau or a federal agency with whom the Human Rights Bureau has a work-sharing agreement.
 - (4) "Code" means the Governmental Code of Fair Practices, Title 49, chapter 3, MCA.
 - (5) "Commission" means the human rights commission, a quasi-judicial board as established by 2-15-1706, MCA.
 - (6) "Commissioner" means the commissioner of the department of labor and industry.
 - (7) "Contested case" means proceedings before the Hearings Bureau to determine the legal rights, duties, and privileges of the parties.
 - (8) "Department" means the Department of Labor and Industry.
 - (9) "Hearing officer" means administrative law judge appointed by the Hearings Bureau to preside over contested case proceedings.
 - (10) "Hearings Bureau" means the organizational unit of the department that conducts contested case proceedings after the Human Rights Bureau has issued a reasonable cause finding on a complaint of discrimination.
 - (11) "Human Rights Bureau" means the organizational unit of the department that informally investigates and seeks resolution to complaints of unlawful discrimination.
 - (12) "Notice of dismissal and right to sue" means a document provided to the charging party by the Human Rights Bureau indicating that charging party has completed the department's administrative process and can file a discrimination action in district court pursuant to 49-2-511, MCA.
 - (13) "Reasonable cause" means that based on an informal investigation a preponderance of the evidence supports a finding of unlawful discrimination.
 - (14) "Respondent" means any person against whom a complaint is filed.
- (History: 49-2-204, 49-3-106, MCA; IMP, Title 49, ch. 2 and ch. 3, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.104 reserved

24.8.105 APPLICABILITY OF COMMISSION RULES (1) In discharging their responsibilities, the Human Rights Bureau and the Hearings Bureau will apply the interpretive rules of the commission contained in ARM Title 24, chapter 9. (History: 49-2-204, MCA; IMP, 49-2-204, 49-2-205, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.106 reserved

24.8.107 RECORD KEEPING REQUIREMENTS FOR EMPLOYERS

(1) All employers, labor organizations, employment agencies, and government agencies shall maintain records pursuant to 49-2-102, MCA, and 42 USCA 2000e-8(c) and (d).

(2) All personnel records made or kept by an employer, including but not necessarily limited to, application forms and other records related to hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation and selection for training or apprenticeship, shall be preserved for two years from the date the record is made or from the date of the personnel action involved, whichever occurs later.

(3) If a discrimination complaint is filed, the respondent shall preserve all personnel records relevant to the complaint until final disposition of the complaint. Personnel records relevant to a complaint include personnel records relating to the charging party and application forms or test papers completed by an unsuccessful applicant and all other candidates for the same position.

(4) Labor organizations shall preserve membership or referral records, including applications for membership or referral, for two years from the date the records are made. If a discrimination complaint is filed, a labor organization shall preserve all records relevant to the complaint until final disposition of the complaint. (History: 49-2-204, MCA; IMP, 49-2-102, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Subchapter 2

Complaints And Investigations

24.8.201 FILING OF COMPLAINTS (1) A complaint may be filed with the Human Rights Bureau by or on behalf of any aggrieved party. Complaints must be filed with the Human Rights Bureau by mail addressed to the Human Rights Bureau, P.O. Box 1728, Helena, MT 59624-1728; personal delivery to 1625 Eleventh Avenue (USF&G Building, second floor), Helena, MT 59601; or fax to (406) 444-2798.

(2) Pursuant to 49-2-501(4)(a), MCA, and subject to 49-2-501(4)(b), MCA, a complaint must be filed within 180 days after the alleged act of discrimination occurred or was discovered.

(3) A complaint is considered to be filed on the date it is received by the Human Rights Bureau, either by mail, hand-delivery, or facsimile. If the last day of the time limit falls upon a Saturday, Sunday, legal holiday, or the department offices are closed on such day, the time limit will run until the end of the next day when the department offices are open.

(a) In the case of a complaint which is deferred or transmitted to the Human Rights Bureau by any government agency pursuant to any agreement entered into between the agency and the department, the complaint is deemed filed as of the date it was filed with the agency which deferred or transmitted the complaint.

(4) When the department has reason to believe that a person is or has been engaging in a discriminatory practice in violation of the Act, the commissioner may file a complaint on behalf of the department pursuant to 49-2-210(1), MCA. A complaint filed by the commissioner may seek relief authorized by law for any and all persons adversely affected by the practice or actions. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-210, 49-2-501, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.202 reserved

24.8.203 FORM OF COMPLAINTS (1) A complaint is a written document filed with the Human Rights Bureau. An aggrieved party or a person filing on behalf of an aggrieved party may draft and file a complaint. Except as provided in (2), a complaint must contain, at a minimum, the following information:

(a) full name, address and telephone number, if any, of the person making the complaint (hereinafter referred to as charging party);

(b) Full name, address and telephone number, if any, of the person against whom the complaint is made (hereinafter referred to as respondent);

(c) a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful discriminatory practice; and

(d) the verified signature of the charging party.

(2) For the purpose of timely filing, any signed written statement may be deemed a complaint if it sufficiently identifies parties and describes the actions being complained of. Such complaint may be verified by amendment after initial filing.

(3) The Human Rights Bureau will notify the charging party of the obligation to submit a verified complaint. If the charging party does not submit a verified complaint, the bureau will dismiss the complaint.

(4) If the charging party does not allege facts sufficient to constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, the Human Rights Bureau will notify the charging party that the department does not have jurisdiction over the complaint, and the case will be dismissed unless the charging party amends the complaint to state a valid claim.

(5) Any person may file a complaint on behalf of any person claiming to be aggrieved if the person is the aggrieved party's guardian, attorney, or duly authorized representative or an advocacy group, labor organization, or other organization acting as an authorized representative. The person making the complaint must provide the name and address of the person on whose behalf the charge is made. During its investigation, the Human Rights Bureau will verify the authorization of such complaint by the person(s) on whose behalf the complaint is made. If the person on whose behalf the complaint is filed indicates in writing that he or she does not wish the complaint processed, the Human Rights Bureau shall dismiss the complaint.

(6) A person wishing to file a complaint on behalf of a class must identify a representative for the members of a class. This representative must adequately reflect the interests of the members. As part of the informal investigation, the Human Rights Bureau will notify the respondent or respondents that the complaint was filed on behalf of a class, but the Human Rights Bureau will not rule on class status. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-504, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.204 reserved

24.8.205 INTAKE PROCEDURE (1) A person claiming unlawful discrimination may contact the Human Rights Bureau by mail or telephone to inquire about filing a complaint of discrimination. Any advice or assistance provided to a potential charging party who contacts the Human Rights Bureau shall be offered objectively and impartially pursuant to 49-2-205, MCA. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-205, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.206 reserved

24.8.207 NOTICE OF FILING OF COMPLAINTS (1) Within ten business days of the filing of a complaint, the Human Rights Bureau shall serve notice of filing upon the parties by mail. The notice shall:

- (a) acknowledge the filing of the complaint and state the date that the complaint was filed;
- (b) include a copy of the complaint;
- (c) advise the parties of the time limits applicable to complaint processing;
- (d) in cases filed pursuant to 49-2-305, MCA (housing cases), advise the parties of their right to commence a civil action under 49-2-510(4)(a), MCA, in an appropriate district court, not later than two years after an alleged unlawful discriminatory practice under 49-2-305, MCA, occurred or was discovered or within two years of the breach of a conciliation agreement entered into under 49-2-504(1)(a), MCA. The notice shall state that the computation of this two-year period excludes any time during which a proceeding is pending under 49-2-510, MCA, with respect to a complaint based on the alleged discriminatory housing practice. The notice shall also state that the time period includes the time during which an action arising from a breach of a conciliation agreement is pending;
- (e) in cases filed pursuant to 49-2-303, MCA (employment cases), advise the parties of the respondent's obligation to preserve all personnel records relevant to the complaint until the final disposition of the complaint, pursuant to ARM 24.8.107;
- (f) advise the parties of their right to receive a copy of all other information submitted with the complaint and during the investigation and right to review their file subject to the provisions of ARM 24.8.210; and
- (g) advise the parties that retaliation against any person because the person made a complaint or testified, assisted or participated in an investigation, a conciliation, or an administrative proceeding, is a discriminatory practice that is prohibited under 49-2-301, MCA. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-301, 49-2-303, 49-2-305, 49-2-504, 49-2-510, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.9.208 and 24.8.209 reserved

24.8.210 CONFIDENTIALITY AND RELEASE OF INFORMATION

(1) There is a compelling state interest in the elimination of illegal discrimination in Montana pursuant to Art. II, sec. 4 of the Montana Constitution (1972). In some cases, the interest of a person in viewing material related to a complaint or gathered as part of the investigation will compete with individual privacy interests. In order to balance these interests, the Human Rights Bureau will take the following steps upon receiving a request for information:

(a) When a person requests information or materials for which an individual right of privacy has been asserted or might be asserted, the Human Rights Bureau will object to the release of this information.

(b) If there is an objection to the release of information, the Human Rights Bureau will promptly advise the requestor that the requestor may file a written request for review of the objection to release.

(c) Upon receipt of a written request for review, the Human Rights Bureau shall immediately refer the request to the Hearings Bureau, and the Hearings Bureau will promptly provide the parties an opportunity to be heard.

(i) A party that has provided information to the department about a nonparty may assert a privacy interest on behalf of a nonparty.

(ii) The Human Rights Bureau may assert an interest in delaying the release of information until the completion of its informal investigation if the release of information would threaten the integrity of a pending investigation.

(2) The department may restrict disclosure of information regarding complaints alleging violations of federal law which are within the jurisdiction of the department because of work sharing arrangements with federal agencies, pursuant to provisions of federal law.

(3) All voluntary resolution agreements are public information except to the extent that they relate to privacy interests protected by law. A governmental entity does not have a privacy interest in any settlement or conciliation agreement.

(4) A hearing officer's decision regarding the release of information is considered the final agency decision for the purpose of judicial review pursuant to the Montana Administrative Procedure Act. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-702, 49-2-501, 49-2-504, 49-2-505, 49-2-506, 49-2-510, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.211 reserved

24.8.212 INFORMAL INVESTIGATION BY THE DEPARTMENT (1) The Human Rights Bureau has the authority to gather sufficient information to allow a thorough scrutiny of the circumstances surrounding complaints of discrimination through an informal investigation. The investigation shall be conducted in a fair and impartial manner. The Human Rights Bureau will utilize methods such as written information requests and telephone and personal interviews to obtain information in the course of the informal investigation. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-205, 49-2-504, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.213 reserved

24.8.214 INVESTIGATIVE SUBPOENAS (1) Pursuant to 49-2-203(3), MCA, a party may request that the commissioner issue subpoenas relating to a matter under investigation in order to further the department's informal investigation. Such requests shall be directed to the Commissioner, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624-1728. (History: 49-2-204, MCA; IMP, 49-2-203, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02.)

Rule 24.8.215 reserved

24.8.216 EFFECT OF FAILURE TO COOPERATE WITH INVESTIGATION

(1) When a party refuses to comply with a request by the Human Rights Bureau for information or evidence reasonably necessary for the investigation, the Human Rights Bureau may take either or both of the following actions to complete its investigative responsibilities:

- (a) request the commissioner to issue a subpoena; and
- (b) draw an adverse inference against the unresponsive party as to the evidence sought. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-504, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.217 through 24.8.219 reserved

24.8.220 FINDING OF REASONABLE CAUSE OR NO REASONABLE CAUSE AND FINAL INVESTIGATIVE REPORT (1) Within 120 days (for cases filed pursuant to 49-2-305, MCA) or 180 days (for all other cases, pursuant to 49-2-504, MCA), the Human Rights Bureau will conclude its informal investigation by issuing a written finding in a final investigative report. The finding will include a brief statement of the reasons for the Human Rights Bureau's conclusions and will be mailed to all parties.

(a) If any or all of the allegations of discrimination contained in the complaint are supported by a preponderance of the evidence, the Human Rights Bureau will issue a finding of reasonable cause and the complaint will be certified for hearing, pursuant to 49-2-505, MCA.

(b) If none of the allegations of discrimination in the complaint are supported by a preponderance of the evidence, if the Human Rights Bureau determines that the complaint is untimely, or if the Human Rights Bureau determines that it lacks jurisdiction over the complaint, the department will issue a finding of no reasonable cause. A finding of no reasonable cause will be accompanied by a notice of dismissal and right to sue in accordance with ARM 24.8.403. After a receipt of a notice of dismissal and right to sue, a charging party may continue the administrative process by filing objections with the commission or discontinue the administrative process and commence proceedings in district court as provided in 49-2-511, MCA. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-305, 49-2-504, 49-2-505, 49-2-511, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Subchapter 3

Conciliation and Settlement

24.8.301 VOLUNTARY RESOLUTION AGREEMENTS (1) The Human Rights Bureau may undertake efforts to achieve a voluntary resolution of the case with the parties. Any voluntary resolution of the complaint agreed to by the parties before the Human Rights Bureau begins its informal investigation is referred to as a mediation agreement. Any voluntary resolution of a complaint agreed to by the parties after the investigation has begun and before the Human Rights Bureau issues a finding on the merits of the claim is referred to as a settlement agreement. Any voluntary resolution agreed to after the Human Rights Bureau issues a reasonable cause finding is referred to as a conciliation agreement.

(2) Any voluntary resolution agreement reached while the complaint is pending in the administrative process, whether mediated by the Human Rights Bureau or agreed to by the parties independently, is subject to the provisions of this rule.

(3) If the Human Rights Bureau issues a reasonable cause finding, it shall attempt to resolve the case through conciliation. During conciliation, the Human Rights Bureau may require affirmative relief provisions to eliminate the discriminatory practice confirmed in the informal investigation. Such affirmative relief provisions may include any remedy which could be ordered by the Hearings Bureau. If conciliation is not possible, the Human Rights Bureau shall inform the parties in writing that the conciliation period is concluded and certify the case for hearing, pursuant to 49-2-505, MCA.

(4) No statement made by any party in the course of voluntary resolution discussions will be admissible in any hearing held concerning the complaint except as provided for by Rule 408, M.R.Evid. Agreement to a voluntary resolution of a case does not necessarily constitute an admission of violation of any law by the respondent.

(5) A voluntary resolution agreement reached by the parties must be in writing, signed by the parties, and approved by the Human Rights Bureau. Dismissal of a case based on a voluntary resolution agreement shall constitute the end of the administrative process.

(6) A voluntary resolution agreement may include terms for monitoring compliance with the agreement, not to extend beyond one year from the date of the agreement.

(7) The parties must inform the Human Rights Bureau of all terms of any voluntary resolution agreement entered into while the complaint is pending in the administrative process. In addition, the parties must inform the Human Rights Bureau of all terms of any voluntary resolution entered into after a final agency decision has been issued.

(8) The Human Rights Bureau may refuse to approve a voluntary resolution agreement which does not resolve all allegations or remedies for all persons or groups affected by the alleged discrimination. Alternatively, the Human Rights Bureau may treat a voluntary resolution agreement which does not resolve all allegations or remedies for all persons or groups affected by the alleged discrimination as a withdrawal in accordance with ARM 24.8.401, and may initiate the complaint as a commissioner complaint for further proceedings.

(9) A conciliation agreement may be enforced by the commissioner, the Human Rights Bureau, or by any party in the same manner as a final order of the department by seeking appropriate orders in the district court, pursuant to 49-2-508, MCA. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-504, 49-2-505, 49-2-508, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Unofficial Version

Subchapter 4

Dismissal and Appeal

24.8.401 WITHDRAWAL OF COMPLAINT DURING THE INFORMAL INVESTIGATION (1) Any person who has filed a complaint with the Human Rights Bureau or any person on whose behalf a complaint has been filed may make a request in writing that the complaint be withdrawn. This request may be made at any time before a finding is issued and must be approved by the Human Rights Bureau. Upon approval by the Human Rights Bureau, withdrawal of a complaint completes the administrative process.

(2) If the withdrawal is based on a private settlement agreement, a copy of the agreement must accompany the request. Private settlement agreements submitted as the basis for withdrawal are subject to the provisions of ARM 24.8.301 until completion of the administrative process.

(3) The Human Rights Bureau may dismiss the complaint upon receipt of a written request for withdrawal of a complaint and approval of that request, except for those parts which the commissioner may initiate as a commissioner complaint. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-210, 49-2-501, 49-2-504, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.402 reserved

24.8.403 DISMISSAL BY THE HUMAN RIGHTS BUREAU (1) The Human Rights Bureau shall conclude the department's administrative proceedings and issue a notice of dismissal and right to sue if:

(a) the Human Rights Bureau determines that it lacks jurisdiction or the statutory authority to investigate the allegations of the complaint; or

(b) the Human Rights Bureau determines that the allegations of the complaint are not supported by a preponderance of the evidence.

(2) A complaint may be dismissed prior to investigation if the charging party does not allege facts which, at a minimum, constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, and has not timely amended the complaint to state a valid claim. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-504, 49-2-511, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Rule 24.8.404 reserved

24.8.405 DISMISSAL BY REQUEST OF A PARTY (REPEALED) (History: 49-2-204, MCA; IMP, 49-2-305, 49-2-509, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; REP, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.406 through 24.8.409 reserved

24.8.410 NOTICE OF DISMISSAL AND RIGHT TO SUE (1) The issuance of a notice of dismissal and right to sue completes the administrative process with regard to any complaint of discrimination in which a notice of dismissal and right to sue is issued.

(2) Each notice of dismissal and right to sue issued by the Human Rights Bureau shall be issued to all parties by mail and shall set forth the following information:

- (a) a statement of the reasons for issuance;
- (b) a notice that in order to pursue the complaint of discrimination, the charging party must petition the district court in the district in which the alleged violation occurred within 90 days of receipt of the notice. The notice shall conspicuously state that if the charging party fails to file a petition in district court within the 90 day period, the claim shall be barred;
- (c) a notice of the court's discretion to award attorney's fees to the prevailing party in a discrimination action in district court;
- (d) a statement regarding the effect of the issuance of the notice of dismissal and right to sue as provided in (1); and
- (e) a statement that the requirements for issuance of a notice of dismissal and right to sue have been satisfied. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-504, 49-2-511, 49-3-315, MCA; NEW, 2002 MAR p. 2908, Eff. 10/18/02; AMD, 2008 MAR p. 2636, Eff. 12/25/08.)

Subchapters 5 and 6 reserved

Subchapter 7

24.8.701 JURISDICTION TO CONSIDER JURISDICTION (1) The Hearings Bureau shall, at all times, have jurisdiction to determine the jurisdiction of the department over any particular contested case. In such situations the rules of procedure of the Hearings Bureau shall apply, and questions of jurisdiction may be resolved by rulings and orders based upon the pleadings or after a hearing, as required to suit the circumstances of the case. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.702 and 24.8.703 reserved

24.8.704 INCORPORATION OF OTHER PROCEDURAL RULES BY REFERENCE (1) To the extent these rules do not provide for or specify procedures, the Hearings Bureau adopts and applies the Montana Rules of Civil Procedure and Montana Rules of Evidence. This adoption excludes references to jury trials, issuance of subpoenas by attorneys, and other exclusively judicial features. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-612, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.705 and 24.8.706 reserved

24.8.707 REPRESENTATION IN A CONTESTED CASE PROCEEDING
(1) All parties before the Hearings Bureau have the right to be represented by an attorney of their choice.
(2) The Hearings Bureau will not provide counsel for parties or provide funds for the payment of counsel.
(3) The department may appear in any contested case for the limited purpose of representing the interests of the public. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.708 and 24.8.709 reserved

24.8.710 APPOINTMENT AND AUTHORITY OF HEARING OFFICER

(1) Contested cases will be presided over and heard by a hearing officer appointed by name in the initial notice of hearing issued by the Hearings Bureau.

(2) The hearing officer has general authority to regulate the course of contested cases, and may exercise those powers and authority provided by 2-4-611, MCA, including all powers and authority provided or implied by law.

(3) The hearing officer may establish prehearing and hearing dates and procedures, rule upon procedural petitions and motions, make procedural rulings and orders which appear necessary from the record, and otherwise regulate the conduct and adjudication of contested cases as provided by law.

(4) No ruling, order, decision, or exercise of the power and authority of a hearing officer is reviewable by the commission prior to the entry of the hearing officer's decision that resolves the complaint, except as otherwise provided in these rules or unless a manifest and irreparable injustice would result.

(5) The authority of a hearing officer terminates upon the entry of a decision on the merits unless the commission further delegates authority for other proceedings or exercise of authority. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-611, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.711 and 24.8.712 reserved

24.8.713 DISQUALIFICATION OF A HEARING OFFICER (1) A party may disqualify a hearing officer from presiding over any matter governed by these rules only upon an affirmative showing, made in good faith, of personal bias, a lack of independence, disqualification by law, or other ground for disqualification allowed by law.

(2) A party seeking to disqualify a hearing officer may do so only upon the filing of a motion which is supported by a sufficient affidavit showing the particular facts and matters which constitute good cause for disqualification under (1). The party must file the motion and affidavit no later than 30 days after that party has notice of the assigned presiding hearing officer.

(3) Following the filing of a motion and affidavit of disqualification and a reasonable period of time for an opposing party to comment upon it, the bureau chief of the Hearings Bureau or his or her designee shall either enter an order of recusal or decline disqualification. That order must specify the particular facts and grounds upon which it is based.

(4) When disqualification is declined, a party objecting to the ruling must petition the commission for an order of disqualification within ten days following the date of the order declining disqualification. If no such petition is filed, the order is not appealable to the commission.

(5) A hearing officer may make an order or give a notice of recusal or self-disqualification at any time. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-611, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.714 and 24.8.715 reserved

24.8.716 EX PARTE CONSULTATIONS (1) A presiding hearing officer may not participate in or initiate any ex parte consultation, as defined in (2), on the merits of a matter with any party or the department.

(2) "Ex parte communication" means the communication with the presiding hearing officer by any person having interest in the outcome of the contested case proceeding regarding the merits of the case without notice or argument by any person adversely interested. A hearing officer may engage in communication concerning administrative or procedural matters where necessary under the circumstances and which does not adversely affect the substantial rights of a party. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-613, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.717 and 24.8.718 reserved

24.8.719 CONTESTED CASE RECORD (1) The record in a contested case shall include all documents listed in the Hearings Bureau docket, including without limitation:

- (a) all pleadings, motions, intermediate rulings;
- (b) all evidence received or considered, including a stenographic record of oral proceedings when requested by a party;
- (c) a statement of matters officially noticed;
- (d) questions and offers of proof, objections and rulings thereon;
- (e) proposed findings and exceptions; and
- (f) any decision, opinion, or report by the hearing officer presiding at the hearing.

(2) The hearing will be recorded electronically unless a party requests a stenographic record. The cost of the transcription shall be paid by the requesting party. If provided, an original transcript shall be included in the record of the contested case.

(3) If an electronic recording of any hearing or proceeding is defective or cannot be transcribed, the hearing officer may reconstruct the record or the parties may reconstruct the record by stipulation. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-614, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.720 and 24.8.721 reserved

24.8.722 PLACE OF HEARING (1) The hearing officer shall hold contested case hearings in the county where the unlawful conduct is alleged to have occurred, unless a party requests a change of venue for good cause shown. The hearing officer may change venue for the hearing of a contested case upon the entry of a default against a respondent, to expedite hearing, or otherwise to provide for a fair hearing upon good cause which appears of record.

(2) The hearing officer may require a party to make arrangements for a suitable place of hearing and bear the cost of facilities to conduct the hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.723 and 24.8.724 reserved

24.8.725 FORMAL PROCEEDINGS (1) All contested case proceedings shall be formal unless informal proceedings or disposition under 2-4-604, MCA, are permitted by stipulation of the parties, agreed settlement, consent order, or default. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-603, 2-4-604, 2-4-612, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.726 and 24.8.727 reserved

24.8.728 INFORMAL PROCEEDINGS (1) Informal proceedings may be conducted where the parties to a contested case jointly waive a formal proceeding, where the default of a party is entered, or where informal proceedings are appropriate following the imposition of sanctions upon a party.

(2) When informal proceedings are used, the hearing officer shall give parties an opportunity to present evidence at a convenient time and place, using fair procedures.

(3) During informal proceedings, the hearing officer may receive and consider evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs, but may not receive or consider evidence which is irrelevant, immaterial, or unduly repetitious. Hearsay evidence may be received and considered to supplement or explain other evidence, but such hearsay evidence may not be considered to support a finding unless it would otherwise be admissible under the Montana Rules of Evidence. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-604, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.729 and 24.8.730 reserved

24.8.731 DOCUMENT FORMAT, FILING, AND SERVICE (1) All

documents, pleadings, and papers to be filed shall be eight and one-half inches by eleven inches (8½" x 11") in size, standard quality, opaque, unglazed paper, with a minimum 50% recycled content, of which at least 10% shall be postconsumer waste, and be printed on both sides (double sided). Exhibits or other documents shall be reproduced in like size unless the original exhibit is required. A hearing officer may require the reproduction of an oversized demonstrative or other exhibit in a size appropriate for the record.

(2) The place of filing is the offices of the Hearings Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728, or during a hearing, by personal delivery to the presiding hearing officer.

(3) Filing with the Hearings Bureau is effective upon actual receipt at the offices of the department or by the hearing officer at the hearing and not upon mailing.

(4) Copies of all submissions filed must be served upon all parties of record, including intervenors or other parties allowed to appear for special purposes, and all submissions must contain or be accompanied by a certificate of service showing proof of the method of service and the date upon which such service was made. Service of copies of submissions upon parties shall be made in accordance with the Montana Rules of Civil Procedure and may be made by means of first class mail, postage prepaid, unless the hearing officer designates another manner of service.

(5) The hearing officer may accept telephonic or oral filings of motions or requests for procedural relief, subject to recording by means of minute entry, note, or the subsequent filing of a true and accurate recording of such matters, upon fair and timely notice to all parties of record.

(6) Filing of a facsimile copy of a document of no more than 20 pages, which is an exact duplicate of the original, shall meet the filing requirements of these rules only if the facsimile copy is followed within five days by filing of the original or original copy of the document and required copies. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-106, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.732 and 24.8.733 reserved

24.8.734 APPEARANCE, DISMISSAL, AND DEFAULT (1) Answers to complaints following the service of the notice of hearing are not required. The contentions of the parties and fair notice of them to prepare for hearing shall be developed through discovery and/or prehearing orders.

(2) Each party shall make its appearance in a contested case within 20 days of the date on which service of the notice of hearing is made upon the party or his or her legal representative. Appearance shall be in the form of a written notice acknowledging service of certification, and a designation of the name, address, and telephone number of the attorney for a party. If a party chooses not to be represented by counsel, such fact shall be indicated in the written appearance. This rule is subject to the provisions of 2-4-106, MCA, and Rule 4D of the Montana Rules of Civil Procedure governing service by mail.

(3) In the event a party fails to appear, fails to comply with an order, fails to prosecute or defend the case, fails to engage in discovery, or otherwise fails to do an act required by law or these rules, the hearing officer may enter an appropriate order terminating the contested case or limiting prosecution or defense of the contested case. Such orders may include dismissal of a complaint, entry of default, disposition by informal procedure, or entry of other appropriate orders.

(4) A party may be relieved of any of the sanctions provided in (3) upon a showing of excusable neglect, good cause, and a good faith willingness to comply with the further orders of the hearing officer or the commission. A party may request such relief by the filing of a motion and supporting affidavit within ten days of the entry of an order imposing such sanctions.

(5) Upon the entry of a default against a respondent, the hearing officer may fix a date or procedures for informal disposition of the complaint. Upon the default, the charging party must present evidence in support of the complaint and proof of damages.

(6) Before the entry of an order of dismissal of a complaint, on any basis other than a decision on the merits, in cases where the department has made a reasonable cause determination, the hearing officer shall notify the department of the proposed dismissal of the case in order to permit the department an opportunity to intervene or seek redesignation for the limited purpose of obtaining the appropriate affirmative relief. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-106, 2-4-603, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.735 and 24.8.736 reserved

24.8.737 INTERVENTION AND LIMITED PARTICIPATION

(1) Intervention will be governed by the applicable rules of civil procedure, except that there is no intervention of right once a case has been certified to the Hearings Bureau for a contested case.

(2) The hearing officer may permit a party who does not seek to intervene as of right to participate in a matter in a limited capacity, but not as a party. A person who may not seek intervention as of right may be permitted to participate in a contested case in a limited manner, such as a friend of the tribunal, where such participation would not cause prejudice to a party, delay proceedings, or deny a fair hearing. In such instances, a limited participant shall not have the right to control proceedings. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.738 and 24.8.739 reserved

24.8.740 CLASS ACTIONS (1) A complaint may be prosecuted as a class action where the outcome of a contested case will affect a class of persons and where a class action would otherwise be allowed under Rule 23 of the Montana Rules of Civil Procedure.

(2) Class action applications, motions, and procedures following certification of a contested case for hearing shall be governed by Rule 23 of the Montana Rules of Civil Procedure and any Montana law governing class actions. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.741 and 24.8.742 reserved

24.8.743 MOTIONS (1) Any party may seek relief in a contested case by means of an appropriate motion. Motions shall clearly state the relief sought by a party, the grounds and authority supporting the entry of an order granting the motion, any prejudice which would result should the motion be denied, and the precise relief desired. All motions which assert factual matters not of record as the grounds for relief must be accompanied by affidavits or verified exhibits which show the facts upon which the proposed relief is grounded. Each motion must be supported by a brief or memorandum of law showing the moving party's entitlement to relief as a matter of law.

(2) The hearing officer may deny any motion which is not supported by an affidavit, where required, and which is not supported by a brief or memorandum of law.

(3) Upon filing a motion, the moving party shall file its supporting brief and any other supporting materials. Within ten days after service of that brief, the opposing party shall file an answer brief and any other supporting materials. Within ten days after the service of the answer brief, the moving party may file a reply brief or other appropriate response.

(4) The failure of a moving party to file a brief in support of the motion may be treated as an admission that the motion is without merit. The failure to file an answer brief may be treated as an admission the motion is well taken and should be granted. The filing of a reply brief by the movant is optional and failure to file one will not subject the motion to summary ruling.

(5) The hearing officer may order live or telephonic oral argument upon a motion on its own motion or that of a party. Oral argument on any motion, including a motion for summary judgment, is waived unless requested by the moving party in the moving party's brief in support of the motion or by the party responding to the motion in the answer brief.

(6) At the discretion of the hearing officer, oral motions may be heard during the course of a hearing or in extraordinary situations which do not result in prejudice to a party. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.744 and 24.8.745 reserved

24.8.746 EVIDENCE (1) The evidence received and considered in contested case proceedings shall conform to the Montana Rules of Evidence and the provisions of 2-4-612, MCA, except as modified for informal proceedings under 2-4-603 and 2-4-604, MCA.

(2) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data. They shall be afforded an opportunity to contest the material so noticed.

(3) Parties have the right to conduct cross-examination for a full and true disclosure of facts, and other examination by way of examination beyond the scope of direct, cross, or redirect examination shall be within the sound discretion of the hearing officer or the commission. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-603, 2-4-604, 2-4-612, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.747 and 24.8.748 reserved

24.8.749 DISCOVERY (1) The methods, scope, and procedures of discovery are those governed and permitted by the Montana Rules of Civil Procedure, recognizing that the hearing officer is not permitted by law to make an award of attorney fees as a sanction for failure to make discovery.

(2) The hearing officer may fix the times, places, and methods of discovery by conference, prehearing order, or otherwise, and may enter appropriate orders for violations of orders fixing discovery procedures.

(3) Depositions, interrogatories and answers to them, requests for production of documents and responses to them, and other discovery documents shall not be filed with the Hearings Bureau without prior leave of the hearing officer.

(4) The use of depositions at hearing or in lieu of testimony by a witness shall be governed by the Montana Rules of Civil Procedure. Where portions of a deposition are necessary for consideration, the hearing officer may order the preparation of excerpts of a deposition to avoid a bulky record or consideration of irrelevant or prejudicial matter. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-602, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.750 and 24.8.751 reserved

24.8.752 AMENDMENT OF COMPLAINT (1) A charging party may amend a complaint to cure defects or omissions, including procedural defects or defects in verification, and to allege new facts and matters arising out of continuing violation of law. A charging party may also amend a complaint where an amendment is necessary to provide a respondent with fair notice of the allegations of a party.

(2) The allowance or denial of an amendment to a complaint shall be governed by the provisions of 49-2-501, MCA, with respect to the time for filing complaints except when the new material relates back to the filing of the original complaint.

(3) The redesignation of a complaint pursuant to 49-2-201, MCA, on behalf of the commissioner shall not, unless so specified, constitute the filing of a new complaint but shall relate to the underlying complaint in a contested case as an amendment to it.

(4) The charging party may amend the complaint only by leave of the hearing officer or consent of an adverse party.

(5) A complaint may be amended by way of a prehearing order which contains the contentions of the parties and which is substituted for pleadings in the contested case.

(6) To the extent the amendment of pleadings is not otherwise addressed in this rule, such amendments shall be governed by the provisions of Rule 15 of the Montana Rules of Civil Procedure. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-501, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.753 and 24.8.754 reserved

24.8.755 PREHEARING CONFERENCES AND ORDERS (1) The hearing officer may hear contested cases based upon a prehearing order which contains the full contentions of the parties as to fact and law, along with their claims for relief. A prehearing order supersedes all prior pleadings in the contested case.

(2) The hearing officer may order preliminary prehearing conferences, prehearing conferences, or other procedures as necessary to appropriately regulate the conduct of the contested case proceeding.

(3) If a party fails to comply with an order to prepare a prehearing memorandum or portions of one, or fails to participate in any prehearing conference or proceeding, a hearing officer may impose sanctions upon that party by way of dismissal of the complaint, default, limitation of evidence in support of or in defense to a complaint, or otherwise. (History: 49-2-204, 49-3-106, MCA; IMP, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.756 and 24.8.757 reserved

24.8.758 SUBPOENAS (1) The hearing officer may issue subpoenas without a request or upon that of a party for the attendance of witnesses or production of evidence. The procedure for service of subpoenas and payment of fees shall conform to the manner provided in civil actions.

(2) The hearing officer may enter appropriate orders, as allowed by law, for the failure of a person subject to the provisions of a subpoena to comply with its terms.

(3) A party seeking to subpoena a state employee, including the Human Rights Bureau investigator, must, as required by 26-2-507 and 26-2-515, MCA, reimburse the department for regular pay and benefits paid to that state employee for time spent answering the subpoena in advance of his or her appearance.

(History: 49-2-204, 49-3-106, MCA; IMP, 2-4-104, 2-4-602, 26-2-507, 26-2-515, 49-2-203, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.759 and 24.8.760 reserved

24.8.761 HEARING (1) A contested case hearing shall be conducted in the manner of civil actions before the district court, sitting without a jury, and the hearing officer may enter appropriate orders during the course of the hearing to assure the conduct of a fair hearing. The method and scope of the presentation of evidence at hearing, as well as the conduct of the hearing, recesses, and continuances, is within the sound discretion of the hearing officer.

(2) The hearing officer may enter appropriate orders to control the conduct of the parties or their attorneys, including conduct which is disruptive or constitutes contempt, and may recess, continue, or limit the course of hearing. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-612, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.762 and 24.8.763 reserved

24.8.764 HEARING OFFICER DECISIONS (1) Following the close of hearing or other proceeding which allows the parties an opportunity for hearing, the hearing officer shall prepare a written hearing officer decision consisting of findings of fact, conclusions of law, and recommended relief, if any. Findings of fact must be based exclusively on the evidence and on matters officially noticed. Each conclusion of law must be supported by authority or by a reasoned opinion. Copies of the hearing officer decision shall be served upon all parties of record.

(2) A hearing officer may render an opinion of law in lieu of detailed references to authority in the making of conclusions of law.

(3) Hearing officer decisions are indexed and available at the offices of both the Human Rights Bureau and the Hearings Bureau and may also be accessed through their respective web sites. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-621, 2-4-623, 49-2-505, 49-2-506, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)

Rules 24.8.765 and 24.8.766 reserved

24.8.767 NOTIFICATION OF ENTRY OF HEARING OFFICER DECISION

(1) Upon the entry of the hearing officer decision, the hearing officer shall give the parties written notice of the entry of that order, including the date of entry of the order and a notification of the rights of the parties to file exceptions to it for review by the commission. (History: 49-2-204, 49-3-106, MCA; IMP, 2-4-621, 49-2-505, 49-3-315, MCA; NEW, 2008 MAR p. 2636, Eff. 12/25/08.)